No. 76-1490

In the Supreme Court of the United States

OCTOBER TERM, 1976

J. R. LEWIS, ET AL., APPELLANTS

v.

STATE OF ALASKA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF ALASKA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
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Washington, D.C. 20530.

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QUESTION PRESENTED

Whether the State of Alaska has properly ratified a transfer of land to the United States for use in settling Native claims.

INTEREST OF THE UNITED STATES

This case arises out of a tripartite dispute among the State of Alaska, the United States, and Natives of Alaska. The dispute was settled by state and federal legislation. The present case was brought by citizens of Alaska, suing in their capacity as taxpayers, seeking to upset the Alaska legislature's approval of that settlement.

The Alaska Native Claims Settlement Act (ANCSA), 85 Stat. 688, as amended, 43 U.S.C. (Supp. V) 1601 *et seq.*, provides that the United States must transfer large amounts of desirable lands to Native corporations in settlement

of Natives' claims. When the Act became effective on December 18, 1971, however, there was insufficient land within the Cook Inlet Region for selection by the Natives of that region. The State had obtained title to much of the desirable low-lying lands in the region, and in 1941 the Federal Government had withdrawn 2 million acres for the Kenai National Moose Range. Other lands had been committed or withdrawn in other ways.

The settlement challenged in the present suit fulfills the United States' obligation under ANCSA. If the decision of the Supreme Court of Alaska should be reversed, the United States might be required to seek other ways of fulfilling its obligation to the Native corporations. The United States therefore has an interest in the proper resolution of this case.[1]

STATEMENT

In 1972 Cook Inlet Region, Inc. ("Cook"), together with five other Alaska Native corporations entitled to land under ANCSA, filed suit in the United States District Court for the District of Alaska. They contended that the Secretary of the Interior had violated his duties under ANCSA, because he had not conveyed to Cook lands sufficient to comply with the requirements of ANCSA. The district court granted judgment for the Secretary. *Cook Inlet Region, Inc.* v. *Morton*, D. Alaska, No. A-40-73, decided February 20, 1975. Plaintiffs appealed (C.A. 9, No. 75-2232, awaiting argument). While this appeal was pending the United States, the State of Alaska, and Cook agreed to an exchange of land in satisfaction of all obligations under ANCSA.

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[1]Indeed, it was argued in the Supreme Court of Alaska that the United States is an indispensable party to this case. The state court did not pass upon that contention (J.S. App. 12 n. 1).

The United States agreed to convey approximately 50 townships of land to the State; the United States also gave the State other valuable considerations, including a tract of land near Anchorage and improved selection rights for other lands. The State agreed to convey 20.5 townships in the Cook Inlet Region to the United States, which would use the land to augment the amount of federal lands available for Native selection under ANCSA. Cook would select a portion of its entitlement under ANCSA from these lands; it agreed to give up other valuable selection rights, primarily in areas recommended to Congress for proposed parks; and, finally, Cook agreed to dismiss the pending litigation.

Congress approved this settlement in Section 12 of Pub. L. 94-204, 89 Stat. 1150, 43 U.S.C. (Supp. V) 1611 note.[2] This statute required the State of Alaska to give formal assent to the settlement no later than March 26, 1976, and it also released the State from any obligations (with respect to the lands in question) under Section 6(i) of the Alaska Statehood Act, 72 Stat. 340.[3]

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[2]The preamble to Pub. L. 94-204 declares that the purpose of the Act is:

> to provide for the settlement of certain claims, and in so doing to consolidate ownership among the United States, the Cook Inlet Region, Incorporated (hereinafter in this section referred to as the "Region"), and the State of Alaska, within the Cook Inlet area of Alaska in order to facilitate land management and to create land ownership patterns which encourage settlement and development in appropriate areas * * * .

[3]Section 6(i) of the Statehood Act provides that grants of land by the United States to the State shall include mineral deposits, and that:

> The grants of mineral lands to the State * * * are made * * * upon the express condition that all sales, grants, deed, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all the minerals in the land so sold * * * . Mineral deposits in such lands shall be subject to lease

The State assented to the settlement. After public hearings, and upon the unanimous recommendation of the State-Federal Joint Land Use Planning Commission, Alaska enacted Chapter 19, Session Laws of Alaska, 1976, which authorized the Governor to convey to the United States the lands specified in the settlement agreement. Section 2 of Chapter 19 provides that "[t]he conveyance shall pass all the State's right, title and interest in the land, including the mineral subsurface estate notwithstanding any other provisions of the law."

Appellants filed suit to enjoin the State's participation in the settlement. Appellants argued in the state court that Chapter 19 violated the Alaska Constitution, as amended by the Statehood Act.

The Alaska Constitution expressed the State's agreement to such conditions on alienation of land as might be imposed by Congress in the Statehood Act (Article VIII, Section 9; Article XII, Section 13). Section 8(b) of the Alaska Statehood Act provided that in the event Alaska became a State, the proposed constitution would be "deemed amended" by any requirements of the Statehood Act. Appellants argued that Section 6(i) of the Statehood Act had become a part of the Alaska Constitution, and that the legislature's attempted conveyance of lands to carry out the settlement was required to take the form of a constitutional amendment, since it involved the transfer of mineral interests.

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by the State as the State legislature may direct: *Provided*, that any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

The Superior Court of the Third Judicial District of Alaska held that Section 6(i) of the Statehood Act had become a part of the State Constitution, and that the prohibition against transfer of mineral interests could not be waived by either Congress or the state legislature (J.S. App. 1-10). It enjoined Alaska's transfer of lands to the United States pursuant to the settlement.

The Supreme Court of Alaska reversed (J.S. App. 11-46). That court, after reviewing in detail the history of the Alaska Constitution and the Statehood Act, concluded that the "shall be deemed amended" language of the Statehood Act prohibited Alaska's alienation of lands (without a reservation of minerals) unless Congress approved such an alienation (*id.* at 18-23). The court held (*id.* at 31):

> a constitutional amendment is not mandated, and * * * legislative approval of the Cook Inlet land exchange is sufficient once Congress consented to lifting the restrictions imposed against alienation of mineral rights.

The court rejected appellants' argument that Chapter 19 violated the "local and special legislation" provision of the Alaska Constitution (*id.* at 31-34).

DISCUSSION

1. The Supreme Court of Alaska has held that, under the State's Constitution, the State may assent to a transfer of lands and mineral rights to the United States by ordinary legislation rather than by constitutional amendment, once the United States has agreed to accept the land. Appellants seek review of this decision. We submit that it is not

reviewable, and that the appeal consequently should be dismissed.[4]

State courts are the final expositors of state law, and federal courts must take the decisions of the state courts on such questions as authoritative. *Abood* v. *Detroit Board of Education,* No. 75-1153, decided May 23, 1977, slip op. 22; *Minnesota* v. *National Tea Co.,* 309 U.S. 551; *Murdock* v. *Memphis,* 20 Wall. 590. Questions concerning the meaning of the Alaska Constitution are to be finally determined by the highest court of that State. Accordingly, the holding of the Supreme Court of Alaska in this case that state legislation, rather than a constitutional amendment, is

[4]There is a serious question whether appellants have standing to maintain this suit. Appellants brought suit as taxpayers of the State of Alaska, and the state court held that this gave them a sufficient interest in the controversy (J.S. App. 15-18). But standing to invoke this Court's jurisdiction is ultimately a question of federal law under Article III of the Constitution, and if a decision of a state court amounts to the issuance of an advisory opinion, it may not be reviewed by this Court. Appellants, as taxpayers, appear to lack standing under *United States* v. *Richardson,* 418 U.S. 166, and *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208. They have no stake in the issues distinct from those of the public at large. Compare *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, with *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* No. 75-616, decided January 11, 1977, slip op. 7-11. Moreover, Section 6(i) of the Statehood Act provides both that the United States has the authority to seek judicial relief for a violation of the restraint on alienation, and that the remedy for violation is forfeiture to the United States. This specific enforcement device limits both the sweep of the statute and the scope of standing to sue. Cf. *Securities Investor Protection Corp.* v. *Barbour,* 421 U.S. 412 (an express statutory provision for one form of enforcement proceeding ordinarily means that no other method of enforcement is permitted); *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, 301 ("it is for Congress to determine how the rights which it creates shall be enforced"). But because the appeal should be dismissed for want of a federal question, there is no need for the Court to consider the standing question.

effective as a matter of state law cannot be reviewed by this Court. Since the Supreme Court of Alaska has held that the State, acting consistently with its own Constitution, has assented to the settlement, that should be the end of this case.

Appellants apparently contend, however, that the state court's decision offends the Statehood Act, because that Act makes the restraint on alienation of mineral rights a part of the State's Constitution. But once the restriction entered the Alaska Constitution it became a part of state law. Alaska is entitled to determine whether its own Constitution has been violated, and, if so, what the remedies are for such a violation. Cf. *Oregon* v. *Hass,* 420 U.S. 714, 719-720. Even if the Statehood Act makes a restriction on alienation of mineral resources part of the Alaska Constitution, the state court would be free to conclude, as a matter of state law, that exceptions could be granted by ordinary legislation rather than by constitutional amendment. A federal question could arise only if Alaska attempted to transfer minerals contrary to the command of Congress expressed in Section 6(i) of the Statehood Act. Congress, however, has modified Section 6(i) *pro tanto* in Pub. L. 94-204, which authorized the very transfer of lands challenged here. Section 6(i) therefore has no continuing force, with respect to the lands in question, except to the extent it is embodied in the Alaska Constitution. That involves no question of federal law.

To put it another way, this case could present a federal question only if Alaska's transfer of minerals to the United States arguably was contrary to Section 6(i). But Congress has authorized the transfer in question, subject only to Alaska's assent. The transfer therefore cannot be contrary to federal law, and the question of how Alaska must give its assent to the transfer involves state law alone.

2. Even if this case presents a federal question, however, that question is not within the appellate jurisdiction of this Court. Appellants invoke this Court's jurisdiction under 28 U.S.C. 1254(1) and (2) (see J.S. 3), but those provisions create jurisdiction only when a decision is "against [the] validity" of a federal statute (Section 1257(1)) or when the parties have challenged a state statute "on the ground of its being repugnant to the [federal] Constitution * * * or laws of the United States, and the decision is in favor of its validity" (Section 1257(2)).

The Supreme Court of Alaska has not held a federal statute invalid or unconstitutional; Section 1257(1) therefore does not apply. And appellants have not argued that any state statute is repugnant to the Constitution or laws of the United States. They have argued, instead, that a law of the United States was incorporated into the State Constitution, and that the State should therefore have acted by constitutional amendment rather than by statute. The effect of the "incorporation" became a matter of a construction of the State's Constitution, however, once it had been completed; there is no problem of constitutional invalidity or of conflict between state and federal law. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 290. Any federal question that might be presented by this case could turn only on the construction of Section 6(i) and Pub. L. 94-204 (cf. *Douglas* v. *Seacoast Products, Inc.*, No. 75-1255, decided May 23, 1977, slip op. 6 and n. 6), and it therefore would not be within the obligatory jurisdiction of this Court.

3. The jurisdictional statement should be treated as a petition for a writ of certiorari (see 28 U.S.C. 2103), and certiorari should be denied. There is no conflict among the circuits or the state courts concerning the meaning of Section 6(i) of the Alaska Statehood Act, and the type of

dispute presented by the present case is unlikely to recur. In any event, the decision of the Supreme Court of Alaska, to the extent it involves an issue of federal law, is correct.[5]

At the time of passage of the Alaska Statehood Act in 1958, federal retention of mineral interests in lands conveyed to States by the United States was established congressional policy. Section 6(i) of the Alaska Statehood Act represented a departure from this policy, providing that grants to the State would include mineral deposits. Section 6(i) prevented the State from alienating the mineral rights, however, and created forfeiture provisions to be enforced by the Attorney General.

Section 6(i), on its face, does not prohibit conveyances to the United States. A statute ordinarily does not govern the rights and privileges of the United States unless the United States is explicitly identified. *United States* v. *United Mine Workers*, 330 U.S. 258, 272; *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 224; *United States* v. *Wyoming*, 331 U.S. 440, 449. Under ordinary principles of statutory construction, then, Section 6(i) does not prohibit Alaska from conveying public lands, together with their mineral interests, to the United States, the grantor.

Indeed, the forfeiture provision of Section 6(i) demonstrates that the restraint on alienation was designed for the sole benefit of the United States. If Alaska violates Section 6(i), the lands are forfeited to the United States. Nothing in this statutory scheme could forbid a conveyance to the United States; if such a conveyance were a violation, the remedy would be forfeiture to the United States.

Since the restraint on alienation is for the benefit of the United States, Congress may waive its rights. When Congress adopted Pub. L. 94-204, expressly approving the

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[5]The United States takes no position concerning the proper interpretation of the Constitution and laws of Alaska.

tripartite land exchange, it waived whatever rights the United States may have had under earlier statutes.[6] Since Pub. L. 94-204 explicitly contemplated a reconveyance of lands and minerals to the United States, it released Alaska from whatever obligations it might otherwise have had (see J.S. App. 18-31).

The United States, the State of Alaska, and Cook have arrived at a compromise solution to the conflicting land claims in the Cook Inlet Region. Congress and the State of Alaska have approved the settlement. This resolution violates no federal statute, and the settlement should be allowed to go into effect.

CONCLUSION

The appeal should be dismissed for want of jurisdiction. Treating the Jurisdictional Statement as a petition for a writ of certiorari, the Court should deny the petition.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.

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[6]Congress also provided in Section 12(a) of Pub. L. 94-204 that the 50 townships of land Alaska was to receive from the United States would not be subject to Section 6(i). This grant, without any restriction on future sale, was the major inducement for Alaska to reconvey other lands to the United States.